

VIRGINIA STATE CRIME COMMISSION

2018 Annual Report: *Pre-Trial Process in Virginia*



Pre-Trial Process in Virginia

Executive Summary

Between 2016 to 2017, Crime Commission staff studied pretrial services agencies in Virginia.¹ In 2018, the Executive Committee of the Crime Commission requested that staff expand the study to examine the overall pre-trial process in Virginia. The pre-trial process encompasses the various stages of a criminal case from the time a defendant is charged with an offense until the trial and/or sentencing. As a result of the expansion of the study, staff focused their efforts on the following components: the Virginia Pre-Trial Data Project, an update on the pretrial services agencies study, and an examination of the overall pre-trial process.

VIRGINIA PRE-TRIAL DATA PROJECT

The Virginia Pre-Trial Data Project is an unprecedented, collaborative effort between numerous state and local agencies representing all three branches of government. Data was obtained from a variety of sources to develop a cohort of nearly 23,000 adult defendants charged across Virginia during a one-month period (October 2017) whose final case dispositions were tracked through December 31, 2018.² The data will allow for comparisons to be made between similarly situated defendants by type of release mechanism, offense, and locality. The data will be analyzed to answer the question posed by the Crime Commission of how effective various pre-trial release mechanisms are at ensuring public safety and appearance at court proceedings. The data will further help to inform policy-making throughout the pre-trial process.

Crime Commission members were presented with three recommendations stemming from the Virginia Pre-Trial Data Project. Recommendations 1 and 3 were endorsed by a majority vote and Recommendation 2 was unanimously endorsed. Legislation was enacted for Recommendation 1 during the Regular Session of the 2019 General Assembly.³ A letter was sent by the Crime Commission to the Office of the Executive Secretary of the Supreme Court of Virginia (OES) in relation to Recommendation 3. Staff anticipates that findings from this Project will be presented in Fall 2019.

Recommendation 1: Amend Virginia Code §§ 16.1-69.24 and 18.2-456 to create a new charge of contempt of court specifically for failure to appear.

Recommendation 2: Request that Crime Commission staff convene stakeholders to develop a plan for statewide data systems integration and case tracking across the criminal justice system and any other related systems.

Recommendation 3: Request that the Office of the Executive Secretary of the Supreme Court of Virginia (OES) be included as part of Recommendation 2 in order to determine a method for tracking the number of criminal defendants statewide who are found to be indigent pursuant to Virginia Code § 19.2-159.

PRETRIAL SERVICES AGENCIES STUDY UPDATE

During 2018, staff continued to examine pretrial services agencies and worked closely with the Virginia Department of Criminal Justice Services (DCJS) and stakeholders to address concerns that were previously identified with the administration and operation of these agencies.⁴ Staff developed and disseminated over 2,000 surveys on behalf of DCJS as part of a formal stakeholder needs assessment to identify the strengths and weaknesses of pretrial services agencies.⁵ Additionally, staff provided oversight of the Virginia Pretrial Services Stakeholder Group that was convened by DCJS to review how pretrial services agencies are administered in Virginia and to make recommendations to improve the delivery of such services.⁶

Staff found that while broad support continues to exist amongst stakeholders for the use of pretrial services agencies, many of the concerns previously identified during this ongoing study persist, including:

- Pretrial investigation reports are not being completed for all defendants who are eligible for pretrial services agency supervision;
- Recommendations provided to judges by pretrial services agencies are inconsistent at times with the facts and circumstances of an offense; and,
- Information is not being provided to all judicial officers, including magistrates, by pretrial services agencies as intended by the Pretrial Services Act due to conflicts within the Virginia Code and other resource and logistical issues.

While these areas of concern continue to exist, DCJS has developed a work plan to address a number of the issues identified relating to the administration of pretrial services agencies.⁷

Due to the ongoing Virginia Pre-Trial Data Project, staff did not make any recommendations to Crime Commission members relating to pretrial services agencies.⁸

PRE-TRIAL PROCESS

The time period encompassed during the pre-trial process includes the initial criminal charge, any appearances before a magistrate or the court, bond hearings, the determination of pre-trial release conditions, and compliance with these release conditions while awaiting trial and/or sentencing. Staff examined various aspects of the overall pre-trial process along with the role and regulation of bail bondsmen.

Staff found that first appearance and bond hearing procedures are generally uniform before magistrates across the Commonwealth; however, such procedures vary before

courts and can differ even amongst courts within the same locality. Staff further discovered that the use of GPS and similar tracking devices varies across the Commonwealth and that there are no statewide regulations for the use of such devices on a pre-trial basis.

Additionally, staff noted that bail bondsmen have a large presence throughout the pre-trial process. As of November 2018, there were 375 actively licensed bail bondsmen in Virginia.⁹ Staff found the following in relation to the role and regulation of bail bondsmen:

- Bail bondsmen guarantee a defendant's appearance at court proceedings and may impose conditions of supervision above and beyond those ordered by judicial officers;
- The criminal background licensing restrictions are less stringent for bail bondsmen than for other professions regulated by DCJS;
- A surety on a bond (bail bondsman, family member, friend, etc.) can request the issuance of a *capias* for the arrest of a defendant from a judicial officer for any reason; and,
- Challenges exist to providing oversight of bail bondsmen due to varying practices by courts and lack of communication between existing data systems.

The Crime Commission unanimously endorsed four recommendations relating to the pre-trial process and bail bondsmen. Legislation was enacted during the Regular Session of the 2019 General Assembly for Recommendations 1 and 2.¹⁰ Legislation was introduced for Recommendation 3, but was left in the Senate Committee on Finance.¹¹

Recommendation 1: Amend Virginia Code § 19.2-121 to require magistrates to complete the existing *Checklist For Bail Determinations* (Form DC-327) and transmit it to the court.¹²

Recommendation 2: Amend Virginia Code § 19.2-149 to require the basis of an arrest to be stated by a surety when requesting a *capias*.

Recommendation 3: Amend Virginia Code § 18.2-64.2 to increase the penalty for carnal knowledge of a defendant by a bail bond company owner or agent from a Class 1 misdemeanor to a Class 6 felony.

Recommendation 4: Request Crime Commission staff to continue to examine the overall pre-trial process and to convene focus groups to address issues of uniformity within that process, including:

- First appearances;
- Bond hearings;
- Timely sharing of information, such as bail condition violations;
- Conditions of supervision and fees (GPS, drug testing, etc.); and,
- Monitoring of pre-trial jail populations.

Staff plans to utilize the findings from the Virginia Pre-Trial Data Project to identify particular areas of concern and inform further examination of the overall pre-trial process in relation to Recommendation 4.

Virginia Pre-Trial Data Project

The Virginia Pre-Trial Data Project is an unprecedented, collaborative effort between numerous state and local agencies representing all three branches of government, including:

- Virginia State Crime Commission;
- Virginia Criminal Sentencing Commission;
- Alexandria Circuit Court;
- Compensation Board;
- Fairfax Circuit Court;
- Office of the Executive Secretary of the Supreme Court of Virginia;
- Virginia Department of Criminal Justice Services;
- Virginia Department of Corrections; and,
- Virginia State Police.¹³

Data was obtained from a variety of sources to develop a cohort of nearly 23,000 adult defendants charged across Virginia during a one-month period (October 2017) whose final case dispositions were tracked through December 31, 2018.¹⁴ Release mechanisms to be examined include summons, personal recognizance bond, unsecured bond, and secured bond, along with certain conditions of release such as pretrial services agency supervision. The data will allow for comparisons to be made between similarly situated defendants by type of release mechanism, offense, and locality. The data will also be analyzed to answer the question posed by the Crime Commission of how effective various pre-trial release mechanisms are at ensuring public safety and appearance at court proceedings.

The data will further help to inform policy-making throughout the pre-trial process on such topics as:

- i. the effectiveness of various pre-trial release mechanisms;
- ii. judicial officer decision-making in relation to bond and conditions of release;
- iii. role of Virginia's current pre-trial risk assessment instrument (VPRAI-R); and,
- iv. the utility of a pre-trial risk assessment instrument in relation to bond determinations.

Crime Commission members were presented with preliminary findings describing the dataset at the November meeting, including the demographics of the defendants in the cohort (gender, age, race), the types of charges included in the October 2017 contact event, the type of bond set at initial contact, and the median bond amounts for felonies and misdemeanors at initial contact.¹⁵

Crime Commission members endorsed three recommendations relating to the Virginia Pre-Trial Data Project at the December meeting. Recommendations 1 and 3 were endorsed by a majority vote and Recommendation 2 was unanimously endorsed. Staff anticipates that findings from this study will be presented in Fall 2019.

Recommendation 1: Amend Virginia Code §§ 16.1-69.24 and 18.2-456 to create a new charge of contempt of court specifically for failure to appear.

Failure to appear can be charged under numerous statutes in Virginia.¹⁶ While some of the statutes provide clarity in identifying when a charge is specifically for failure to appear, other statutes are not as clear. For example, if a defendant was charged under the general contempt of court statute,¹⁷ it is difficult to determine whether the charge was for failure to appear or for some other violation of a court order, such as failure to complete community service or pay restitution, if there was no official recordation of the reason for the contempt charge. Staff found that the ambiguity of these statutes creates a significant hurdle in attempting to determine statewide appearance rates on criminal charges in Virginia. Staff proposed this recommendation in order to provide a more uniform method of charging failure to appear and to more efficiently track statewide court appearance rates.

House Bill 2452 (Delegate Les R. Adams) was enacted during the Regular Session of the 2019 General Assembly to address this recommendation.¹⁸ This legislation:

- i. created a new charge specifically for willful failure to appear within the general contempt of court statute;¹⁹
- ii. directed that charges of contempt of court for failure to appear be issued under this new provision;
- iii. required the court to specify in writing the reason for which a person was charged with or punished for contempt; and,
- iv. specified that the new failure to appear provision within the contempt statute does not preclude prosecution under the criminal code statute for failure to appear.²⁰

Concerns were raised about this legislation in regard to the *willfulness* element of failure to appear and the *summary* nature of certain contempt proceedings. Staff conducted research in order to address both of these concerns. In regard to the *willfulness* element, Virginia case law requires a finding of willful intent in order to support a conviction for criminal contempt.²¹ The Virginia statute punishing criminal failure to appear specifically includes willfulness as an element of such offense.²² This willfulness element was ultimately included in the legislation that created the new charge of failure to appear within the general contempt of court statute.²³ It should also be noted that if a person is provided with notice of a hearing date and does not appear, the court can infer that the failure to appear was willful.²⁴

In regard to *summary* proceedings under the general contempt statute, staff noted that the statute is permissive in that courts “may” punish summarily for contempt.²⁵ While the statute allows for summary punishment, due process generally requires notice of a charge and opportunity to be heard unless the contemptuous behavior occurred in open court.²⁶ Statewide general district court data provided by OES for

October 2017 (not related to data within the Virginia Pre-Trial Data Project) showed that individuals were currently being charged with failure to appear under the general contempt statute.²⁷ Consultations with practitioners revealed that while individuals are being charged with failure to appear under the general contempt statute, the common practice was to issue a charge, appoint counsel, and conduct a hearing on the matter. Staff determined that legislation would preserve current practices while allowing for better tracking of appearance rates across the Commonwealth.

Recommendation 2: Request that Crime Commission staff convene stakeholders to develop a plan for statewide data systems integration and case tracking across the criminal justice system and any other related systems.

One of the benefits of the Virginia Pre-Trial Data Project was identifying the strengths and weaknesses of each data system used to generate the dataset. Combining the required information across multiple agencies in a precise manner was a very arduous and time-consuming task. All of the systems utilized for the Project were designed and created for different purposes based upon the needs of individual agencies. Each system had limitations, many were antiquated, and the capabilities of systems to interface with each other were limited or non-existent. Consequently, while each system may serve the needs of an individual agency, the systems do not functionally capture and share data that can be readily accessed.

Staff proposed this recommendation because integrated data systems are needed in order to efficiently assess the effectiveness of Virginia’s criminal justice system on a regular basis. Under the current data housing structure, combining the information obtained as part of the Virginia Pre-Trial Data Project on a regular basis would be nearly impossible with existing resources. The goal of statewide data system integration and case tracking is to provide evidence-based information that can be used by policy makers, practitioners, and researchers to inform decision-making and improve the overall criminal justice system.²⁸

Recommendation 3: Request that the Office of the Executive Secretary of the Supreme Court of Virginia (OES) be included as part of Recommendation 2 in order to determine a method for tracking the number of criminal defendants statewide who are found to be indigent pursuant to Virginia Code § 19.2-159.

Staff attempted to determine the number of criminal defendants in Virginia who were found to be indigent by the court; however, that figure was not readily available. The number of indigent defendants in Virginia is vital to know due to the current national debate regarding the use of monetary bail.²⁹ The premise of the debate is that low-income defendants often remain detained prior to trial because they do not have the resources to post a monetary bond. The utilization of pretrial services agency supervision has been proposed as an alternative to monetary bond.³⁰ Data from DCJS showed that 59% (16,964 of 28,711) of placements made to pretrial services agency supervision in Virginia during FY18 were in conjunction with a secured bond.³¹

If a defendant claims to be indigent and is charged with a criminal offense that is punishable by death or incarceration, the court must determine whether that defendant qualifies as indigent for purposes of appointing counsel based upon the guidelines set forth in the Virginia Code.³² The number of indigent defendants in Virginia's criminal justice system is unknown. Currently, only a proxy number of indigent defendants can be determined based on the type of attorney recorded at case closure within the OES Court Case Management Systems (CCMS).

Several challenges exist to determining an accurate or precise number of defendants found to be indigent. First, data is not specifically recorded for determinations of indigency by the court. While information is noted on a form and placed in the court file, the determination of indigency is not recorded in the CCMS.³³ Second, if the court or the Commonwealth's Attorney waive jail time, or if the defendant waives his right to be represented by an attorney, then he is not entitled to court-appointed counsel and no determination of indigency is required.³⁴ Third, friends or family of an indigent defendant may use their own resources to retain an attorney on his behalf. Fourth, the current CCMS is designed as a case-based tracking system, and therefore a formal methodology would need to be developed in order to determine the total number of individual defendants found to be indigent.

In recognition of the challenges to determining the number of indigent defendants, staff proposed including OES in the discussions relating to statewide data systems integration and case tracking. The Crime Commission sent a letter to OES which noted the significance of tracking the number of indigent defendants and requested that OES continue to participate in discussions related to statewide data systems integration and case tracking.

Pretrial Services Agencies Study Update

Due to the ongoing Virginia Pre-Trial Data Project, staff did not make any recommendations to Crime Commission members relating to pretrial services agencies;³⁵ however, staff continued to examine and monitor these agencies throughout the course of the year. Crime Commission staff worked closely with DCJS and stakeholders to address concerns that were identified with the administration and operation of pretrial services agencies during this ongoing study.³⁶ Staff developed and disseminated over 2,000 surveys on behalf of DCJS as part of a formal stakeholder needs assessment to identify the strengths and weaknesses of pretrial services agencies.³⁷

The needs assessment resulted in a large amount of positive feedback relating to (i) awareness and understanding of pretrial services agencies, (ii) value of pretrial agencies services and supervision, (iii) good working relationships among stakeholders, and (iv) adequacy of training. The large majority of responding stakeholders "agreed to strongly agreed" that:

- They understand the role and purpose of pretrial services agencies;
- Pretrial services agencies are a necessary component of the criminal justice system; and,

- Pretrial services agencies provide a valuable service to their court system or their locality.

The needs assessment also identified several areas of concern amongst stakeholders, including:

- A desire for more training opportunities;
- Pretrial services agencies not notifying prosecutors and defense counsel of bond condition violations;
- Deficiencies in the Pretrial and Community Corrections case management system (PTCC);
- The role of Virginia’s revised risk assessment instrument (VPRAI-R);
- Increased placements and failures to appear by defendants placed on pretrial services supervision, potentially due to the “monitoring” supervision level included in the new Praxis;
- The purpose and role of pretrial services agency officers being present in court and in making release/detain recommendations;
- Magistrate bail decisions;
- Resource and funding needs of pretrial services agencies;
- Lack of a funding formula for the allocation of state funds; and,
- Reduction in state funding.

Additionally, staff provided oversight of the Virginia Pretrial Services Stakeholder Group that was convened by DCJS to review how pretrial services agencies are administered in Virginia and to make recommendations to improve the delivery of such services.³⁸ Based upon the results of the needs assessment, oversight of DCJS work group, and continued communications with stakeholders, staff found that while broad support continues to exist for the use of pretrial services agencies, many of the concerns previously identified during this study persist.

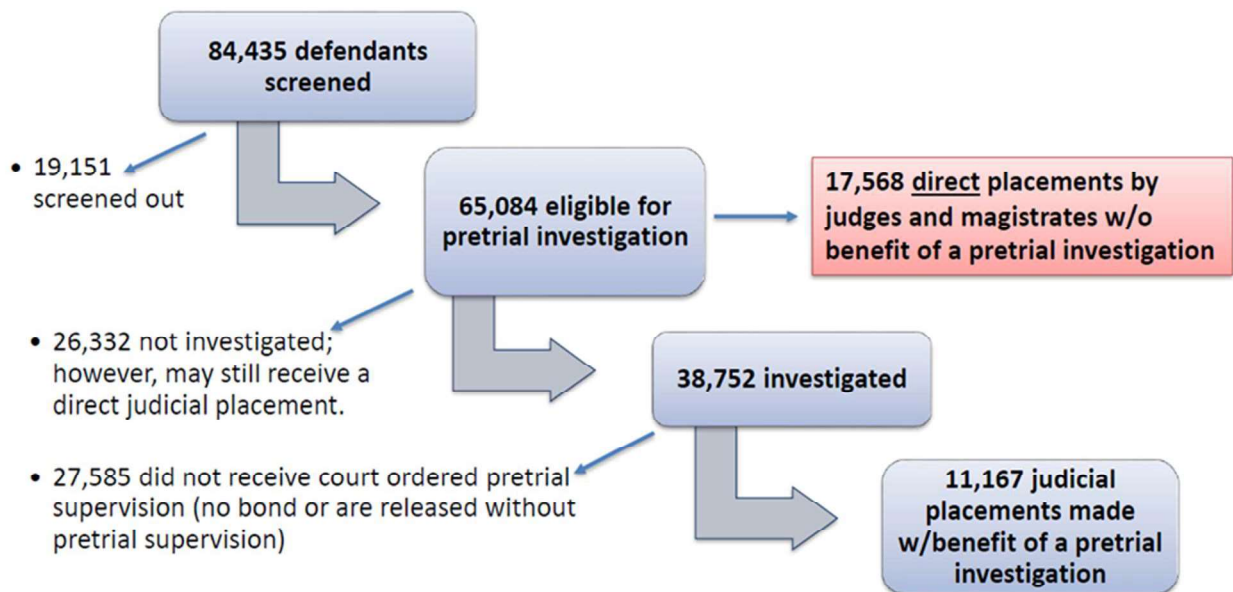
Pretrial investigation reports are not being completed for all defendants who are eligible for pretrial services agency supervision.

The Virginia Code requires pretrial services agency officers to investigate and interview defendants who are detained in jails and to complete a pretrial investigation report for the court.³⁹ In FY18, over 27,500 of the nearly 39,000 defendants who received a pretrial investigation were not ultimately placed on pretrial services agency supervision as a condition of bond. The fact that a defendant was interviewed and not placed on pretrial services agency supervision was not a concern noted by staff because the court had received information to use when making a bond determination. However, over 26,000 defendants who were eligible for a pretrial investigation did not receive one. Throughout the course of the study, staff were presented with numerous reasons as to why pretrial investigations are not completed, such as mental health issues, medical emergencies, intoxication, limited resources of pretrial services agencies, time constraints at jails, malfunctioning video interview equipment, and defendants who refuse to be interviewed. While there are many reasons why a pretrial investigation may not be completed, data is not readily

available or consistently maintained in order to determine why such a high number of eligible defendants are not receiving the required pretrial investigation.

Additionally, it should be noted that significantly more defendants were placed on pretrial services agency supervision without a pretrial investigation (direct placement) than with such an investigation.⁴⁰ Of the 28,735 placements to pretrial services supervision made in FY18, 61% (17,568) of defendants were directly placed without a pretrial investigation, while only 39% (11,167) of defendants were placed following such an investigation.⁴¹ Staff found these numbers to be significant for two reasons. First, pretrial services agencies invest significant resources in conducting pretrial investigations. Second, pretrial services agency directors and officers frequently commented on the lack of resources available to such agencies. The resources required to conduct such pretrial investigations coupled with the lack of resources that pretrial services agencies are facing is an issue that must be further examined as agencies consider how to allocate resources between their investigative and supervision responsibilities.

Pretrial Services Agency Placement Progression, FY18



Source: Graphic prepared by Virginia State Crime Commission staff based upon data provided by the Virginia Department of Criminal Justice Services, FY18 PTCC Merged Monthly Report.

Recommendations provided to judges by pretrial services agencies are inconsistent at times with the facts and circumstances of an offense.

Pretrial services agencies may provide three different recommendations to the court: release, detain, or no recommendation.⁴² Concerns have been raised over the credibility of these recommendations because they are based upon a matrix that does not include all the factors which a judicial officer is required to consider. The Virginia Code requires pretrial services agency officers to present a pretrial investigation

report with recommendations to the court in order to assist with bail determinations.⁴³ The Code also requires judicial officers to consider ten specific factors when setting the terms of bond.⁴⁴ The first factor listed that judicial officers must consider is “the nature and circumstances of the offense”,⁴⁵ which is noteworthy because this factor is not taken into account by the risk assessment tool used by pretrial services agencies to make a recommendation.⁴⁶

It should be noted that pretrial risk assessment tools, including the VPRAI, were developed as a tool to assist rather than supplant judicial decision-making. Staff consulted with several judges and were provided with numerous pretrial investigation reports in which the recommendation did not appear appropriate to the judge making the ultimate determination on bond. While judges continue to value the information obtained during the pretrial investigation, some judges have developed serious concerns about the credibility of the recommendations provided by those same agencies.⁴⁷ Credibility concerns typically arise when the particular facts and circumstances of a case would lead a reasonable person to deny bond (serious flight risk, risk to public safety or self, etc.) or when recommendations contradict current Virginia statutes that mandate a presumption against bail or require a secured bond. Such credibility concerns are not unique to Virginia or to the specific VPRAI risk assessment tool. Emerging research, including interviews of key stakeholders across multiple states, has highlighted that judges,⁴⁸ as well as prosecutors, defense counsel, and pretrial services staff,⁴⁹ value the information provided by risk assessment tools, but also share similar concerns in regard to the credibility of some recommendations.

Additionally, staff found that there was concern from both judges and pretrial services agency officers in regard to the 85% Praxis recommendation concurrence rate established by DCJS.⁵⁰ Judges expressed concern that their adherence to this rate was being tracked when making bond determinations. Pretrial services agency officers noted that adherence to this rate may be a consideration when deciding whether to override a recommendation from the Praxis matrix.

The pretrial services agency recommendation to the court auto-fills in the Virginia Pretrial Risk Assessment Report based upon information entered into the PTCC case management system and the Praxis decision-making matrix within that system.⁵¹ This recommendation is based upon the defendant’s risk level, as determined by eight risk factors, and the charge category established within the Praxis matrix.⁵² Objective risk assessment instruments are unable to account for the factual nuances of each individual criminal offense; however, as noted in the 2016 report on the VPRAI and Praxis Revised, “...the release and detention recommendation by Pretrial Services should be driven primarily by risk, yet with legitimate consideration of the seriousness of the current offense, and with responsiveness to risk tolerance which dictates more restrictive recommendations for certain types of charges.”⁵³ Pretrial services agency officers are instructed to note mitigating/aggravating considerations in the report to the court and do have authority to override the auto-generated recommendation; however, DCJS requires that “the Praxis recommendation concurrence rate for each agency must be 85% or higher.”⁵⁴

Information is not being provided to all judicial officers, including magistrates, by pretrial services agencies as intended by the pretrial services act due to conflicts within the virginia code and other resource and logistical issues.

The purpose of Virginia's Pretrial Service Act is to establish pretrial services agencies to assist judicial officers in discharging their duties relating to bail determinations.⁵⁵ While the intent of the Pretrial Services Act is to ensure that information is provided to judicial officers to assist with bail determinations, the Virginia Code only requires pretrial services agencies to provide a pretrial investigation report to the court.⁵⁶ Judicial officers include judges, magistrates, and clerks or deputy clerks of district and circuit courts.⁵⁷ Staff were only able to identify one pretrial services agency that routinely provides information to magistrates to assist with bail determinations.⁵⁸

Providing information to magistrates is significant because the Virginia Code requires that a person who is arrested must be taken without unnecessary delay before a judicial officer.⁵⁹ Nearly all arrested individuals are initially taken before a magistrate, where the first bond hearing is conducted and a decision to detain or set the conditions of pre-trial release is made.⁶⁰ Best practices for pretrial services agencies seem to underscore that corroborated information should be provided to judicial officers early in the criminal justice process.⁶¹ Additionally, numerous organizations have called for the use of a "validated pretrial risk assessment as a component of a fair pretrial release system..."⁶² Magistrates in Virginia have expressed a desire to receive information from pretrial services agencies.⁶³ While acknowledging that resource and logistical issues may create obstacles to providing information to magistrates, staff identified the first appearance before a magistrate as an opportune time to begin providing information to assist with bail determinations.

DCJS Administrative Actions

At the November meeting of the Crime Commission, DCJS provided an update on its efforts to address the administration of pretrial services agencies.⁶⁴ This presentation included a DCJS work plan to implement a revised VPRAI report, provide enhanced training for pretrial services agency officers and stakeholders, update and replace the PTCC system, implement an enhanced monitoring process to ensure pretrial services agencies are in compliance with DCJS standards and guidelines, develop a funding formula for pretrial services agencies, and revalidate the VPRAI with a larger data set.⁶⁵

Pre-Trial Process

The pre-trial process encompasses the various stages of a criminal case from the time a defendant is charged with an offense until the trial and/or sentencing of the matter. This time period includes the initial charge, any appearances before a magistrate or the court, bond hearings, the determination of pre-trial release conditions, and compliance with any of those release conditions while awaiting trial and/or sentencing. In order to fully understand how the pre-trial process functions across Virginia, staff reviewed relevant Virginia Code provisions, conducted field visits, and

observed court proceedings, magistrate offices, pretrial services agencies, and bail bondsmen. Through these interactions, staff found that the pre-trial process across Virginia is quite diverse.

Procedures before magistrates are generally uniform across the Commonwealth.

The Virginia Code requires that a person who is arrested must be taken without unnecessary delay before a judicial officer.⁶⁶ Nearly all arrested defendants are initially taken before a magistrate, where the first bond hearing is conducted and a decision to detain or set the conditions of pre-trial release is made.⁶⁷ When conducting a bond hearing, magistrates are required to consider ten factors set forth in the Virginia Code.⁶⁸ Magistrates commonly record information obtained during this bond hearing on a *Checklist For Bail Determinations* (Form DC-327) and then forward this form to the court with other documents of the case.⁶⁹ It is important to note that this form is not a risk assessment tool like the Virginia Pretrial Risk Assessment Instrument (VPRAI). The form was developed to assist magistrates with considering all the factors mandated by the Virginia Code while conducting the bond hearing.

Magistrates generally have broad discretion when setting the conditions of pre-trial release for a defendant;⁷⁰ however, the Virginia Code does impose three distinct restrictions on these decisions:

1. If a defendant is charged with an offense that carries a rebuttable presumption against bail, the magistrate cannot admit that defendant to bail without the agreement of the Commonwealth's Attorney;⁷¹
2. If a defendant is arrested on a *capias* where the court has set the terms of bail, the magistrate must either impose the terms ordered by the court or set more restrictive terms;⁷² and,
3. If a defendant is arrested on a felony and has a prior felony conviction, is on bond for an unrelated arrest, or is on probation or parole, the magistrate can only release that defendant on a secured bond, unless the Commonwealth's Attorney agrees to waive the secured bond requirement.⁷³

Procedures before the court vary widely across the Commonwealth.

Staff focused the study on two types of pre-trial proceedings before the court, including the defendant's first appearance and any bond hearings. Procedures for both of these types of proceedings vary by court and can differ even amongst courts within the same locality.

First Appearance

The term "first appearance" refers to the time when a defendant is first brought before a judge following his arrest. Staff discovered that the terminology for this event varied across jurisdictions, with localities using terms such as first appearance, advisement, or arraignment to describe this proceeding. Staff further found that the procedures for this first appearance vary by (i) time waiting to appear before a judge, (ii) parties present, (iii) use of technology, and (iv) consideration of bond.

Several reasons exist for these variances in practices. First, not all courts are in session every day of the week in all areas of the Commonwealth. The Virginia Code requires that a person who remains detained on a criminal offense must be brought before the court on the first day that the court sits after the person has been charged.⁷⁴ In some jurisdictions, the court sits every day of the week, while in other jurisdictions the court may only sit once every week.⁷⁵

Second, the Virginia Code only requires that the defendant be brought before the court and informed of his right to counsel and the amount of his bond.⁷⁶ Some courts strictly comply with this requirement, while in other courts, the defendant, counsel for the defendant, the Commonwealth's Attorney, and a pretrial services agency officer are all present at the first appearance. Third, while the Virginia Code allows for personal appearance by two-way electronic video and audio,⁷⁷ not all courts possess the resources or broadband capability to utilize this equipment.

Finally, a great deal of confusion exists in the field regarding whether the terms of bail can be modified at the first appearance. The Virginia Code only requires that the court "inform" the defendant of the amount of his bond at the first appearance.⁷⁸ That same Code provision also requires the court to hear bond motions from either the defendant or the attorney for the Commonwealth as soon as practicable; however, the statute does not specify whether such motions must be heard at the first appearance.⁷⁹ Separate Virginia Code provisions address the procedures for appealing bail conditions⁸⁰ and for increasing the amount of bond or revoking bail.⁸¹ These various statutes created numerous questions amongst practitioners, such as whether (i) the court may review bond conditions at the first appearance, (ii) the court is required to review bond conditions at the first appearance, (iii) the court is limited only to decreasing bond amounts at the first appearance, and (iv) a review of bond conditions at the first appearance constitutes a bond hearing and thereby prohibits future consideration of the bond by that same court. Staff observed that courts in some jurisdictions consider bond at first appearance while other jurisdictions require that a formal bond hearing be scheduled prior to making any such determinations.

Bond Hearings

As with first appearance procedures, staff found that practices relating to bond hearings before courts vary by such factors as frequency of dockets, limits on the number of bond hearings per day, and local rules and procedures. The Virginia Code requires that absent good cause, a bond hearing must be held within three days from the time a motion is made for such a hearing.⁸² During 2018, staff assisted the *Pretrial Release Study Group* of the Virginia Criminal Justice Conference with the development of a survey for Commonwealth's Attorneys, Public Defenders, and court-appointed counsel to assess compliance with this statute.⁸³ The survey responses identified several reasons that contribute to difficulties in complying with this statute, such as the length of time between days when court is in session, limits on the number of bond hearings that will be conducted per day, and local rules that require advance notice or coordination amongst various parties in order to have the matter placed on the docket. Furthermore, because decisions relating to bond may be appealed,⁸⁴ the

practices for scheduling a bond hearing in the district court may vary from the procedures for docketing such a hearing in the circuit court.

When setting the conditions of pre-trial release for a defendant, a judge is only limited by one of the three distinct restrictions imposed on magistrates by the Virginia Code. If a defendant is arrested on a felony and has a prior felony conviction, is on bond for an unrelated arrest, or is on probation or parole, a judge can only release that defendant on a secured bond, unless the Commonwealth's Attorney agrees to waive that secured bond requirement.⁸⁵ However, a judge may set bond conditions, without the agreement of the Commonwealth's Attorney, for a defendant who is charged with an offense that carries a rebuttable presumption against bond.⁸⁶ Furthermore, judges are not prohibited from modifying the terms of bond that were set by a court when issuing a *capias* for a defendant.⁸⁷

Variances exist across the Commonwealth in relation to the use of GPS and similar tracking devices on a pre-trial basis.

Staff found that the use of GPS and similar tracking devices varies across the Commonwealth. The Virginia Code allows judicial officers to place defendants on monitoring by a GPS or similar tracking device as a condition of pre-trial release.⁸⁸ The Code further permits the court to order that the defendant pay the costs associated with monitoring by such a device.⁸⁹ During last year's study, staff conducted an informal survey which revealed that the availability, vendors, and costs (\$3-\$15 per day) varied greatly across the Commonwealth.⁹⁰

Staff further discovered that no statewide regulations exist for the use of GPS or similar tracking devices on a pre-trial basis. Language in the 2010 state budget required the Secretary of Public Safety to coordinate the development of a system for using GPS or other forms of electronic monitoring as an alternative to incarceration.⁹¹ That budget language further required DCJS to develop guidelines and the Department of Corrections to negotiate statewide contracts for the use of such devices by sheriffs and regional jails.⁹² The guidelines were finalized and published by DCJS.⁹³

Staff noted that numerous regulations exist in Virginia for ignition interlock systems which are installed on a defendant's vehicle following a conviction for driving under the influence.⁹⁴ Those regulations address such matters as approval of such devices, fees, device specifications, calibration, and records and reporting.⁹⁵ It is important to note that the Virginia Alcohol Safety Action Program (VASAP) is primarily funded by fees from offenders ordered to participate in the program along with periodic federal highway grant monies.⁹⁶ While extensive regulations exist for the use of these ignition interlock systems on convicted defendants, no such regulations exist for the use of GPS or similar electronic devices to monitor pre-trial defendants who are presumed innocent of any offense.

Staff considered multiple options to address the varying practices and lack of regulations for GPS and similar tracking devices on a pre-trial basis; however, challenges exist for each of these options. Staff determined that (i) DCJS does not

currently possess the technical expertise to develop regulations for these devices, (ii) funding would be required for such regulations, (iii) electronic monitoring programs could not be self-funded in the same manner as VASAP, (iv) creating additional requirements governing the use of such devices could result in less people being released from custody, and (v) in some instances, these electronic devices are utilized based upon a civil contract as opposed to an order from a judicial officer. Staff concluded that further research is necessary to develop potential solutions to the variances in use and lack of regulations for these electronic devices on a pre-trial basis.

ROLE AND REGULATION OF BAIL BONDSMEN

Staff were asked to examine the role and regulation of bail bondsmen in the pre-trial process. In undertaking this directive, staff conducted field visits, consulted with numerous bail bondsmen, developed and disseminated a survey to all licensed bail bondsmen, and reviewed pertinent Virginia Code provisions and regulations.

Bail bondsmen have a large presence throughout the pre-trial process in Virginia. As previously noted, data from DCJS showed that 59% (16,964 of 28,711) of placements made to pretrial services agency supervision in Virginia during FY18 were in conjunction with a secured bond.⁹⁷ This figure does not account for the numerous defendants who were ordered to post a secured bond without being placed on pretrial agency services supervision.⁹⁸

There are three types of licenses for bail bondsmen in Virginia. An individual may hold one or a combination of these licenses, including:

Surety bail bondsmen: These bondsmen serve as agents on behalf of insurance companies that guarantee the bond for a defendant.⁹⁹ In addition to being licensed by DCJS as bail bondsmen, these individuals are also licensed as property and casualty insurance agents by the State Corporation Commission (SCC).¹⁰⁰ Because of this dual licensing, oversight of these individuals is provided by both DCJS and the SCC.¹⁰¹ Both DCJS and the SCC are required to share information with each other concerning the licensure of these individuals.¹⁰²

Property bail bondsmen: These bondsmen, or their agents, pledge real property, cash, or certificates of deposit as security for guaranteeing the bond for a defendant.¹⁰³ Each property bail bondsman must provide proof of collateral of at least \$200,000 for himself plus an additional \$200,000 for each of his agents.¹⁰⁴ The aggregate value of the bonds posted by these bondsmen cannot exceed four times the value of the collateral.¹⁰⁵ Oversight of these bondsmen is only performed by DCJS.¹⁰⁶

Agent: These bondsmen have been given power of attorney to write bonds on behalf of a property bail bondsman.¹⁰⁷ Oversight of these individuals is only performed by DCJS.¹⁰⁸

As of November 2018, there were 375 actively licensed bail bondsmen in Virginia.¹⁰⁹ This included 238 surety bail bondsmen, 51 property bail bondsmen, 56 agents, and an additional 30 bondsmen who had a combination of these licenses.¹¹⁰

It is important to note that bail bondsmen are regulated as individuals. Furthermore, while the SCC regulates various financial services, business entities, and public utilities,¹¹¹ neither the SCC nor DCJS are expressly authorized to investigate and regulate businesses that engage in property bail bonding.¹¹²

Bail bondsmen guarantee a defendant's appearance at court proceedings and may impose conditions of supervision above and beyond those ordered by judicial officers.

Bail bondsmen guarantee a bond that has been posted to “...assure performance of terms and conditions specified by order of an appropriate judicial officer as a condition of bail.”¹¹³ The Virginia Code does not specifically require bail bondsmen to supervise the conditions of bond that were ordered by a judicial officer.¹¹⁴ Staff found that bail bondsmen view their primary role as ensuring that the defendant appears at court proceedings as required.¹¹⁵ These bail bondsmen further advised that they do not routinely supervise the conditions of release imposed by judicial officers. Staff observations of the practices of bail bondsmen revealed that they rely heavily on the family, friends, and/or acquaintances of the defendant when deciding whether to post the bond and in seeking to ensure that the defendant appears at court proceedings. It is not uncommon for a bail bondsman to post a bond without ever speaking to the defendant since much of their interaction is with the family, friends, and/or acquaintances of the defendant who will be the co-signers on the bond. These practices allow bail bondsmen to guarantee the appearance of not only Virginia residents, but of residents of other states who live near Virginia’s borders and are charged with committing crimes in the Commonwealth.

While bail bondsmen do not routinely supervise the conditions of release imposed by judicial officers, they may at times place conditions on the defendant that are above and beyond what was ordered by a judicial officer. For example, staff learned from discussions with bail bondsmen that they may require defendants to agree to such provisions as GPS monitoring, drug testing, drug treatment, or a curfew, as a condition of posting or maintaining the bond. These conditions are more commonly imposed when family, friends, and/or acquaintances of the defendant advise the bail bondsman of behavior by the defendant that creates a risk to himself, the community, or to the likelihood that he will not appear at court proceedings.

The criminal background licensing restrictions are less stringent for bail bondsmen than for other professions regulated by DCJS.

A person who has been convicted of a felony cannot be licensed as a bail bondsman unless they have been pardoned or their civil rights have been restored.¹¹⁶ However, because bail bondsmen are licensed as individuals, a person who is disqualified from licensure due to a felony conviction could still own and operate a property bail

bonding company by retaining other licensed bail bondsmen to write bonds on behalf of that company.¹¹⁷

Additionally, there are no misdemeanor convictions that will disqualify a person from becoming licensed as a bail bondsman.¹¹⁸ The lack of disqualifying misdemeanor convictions stands in contrast to several other professions regulated by DCJS that including certain disqualifying misdemeanor convictions, such as private security services,¹¹⁹ bail enforcement agents,¹²⁰ special conservators of the peace,¹²¹ and tow truck drivers.¹²²

A surety on a bond (bail bondsman, family member, friend, etc.) Can request the issuance of a *capias* for the arrest of a defendant from a judicial officer for any reason.

The Virginia Code allows the surety on a bond to request a *capias* for the arrest of a defendant and mandates that judicial officers issue the *capias* when such a request is made.¹²³ The statute contains no provision requiring that the surety provide a reason for why the *capias* is being requested.¹²⁴ It is important to note that the surety on the bond can be any number of individuals, including a bail bondsman, family member, friend, employer, or other acquaintance of the defendant.

Challenges exist to providing oversight of bail bondsmen due to varying practices by courts and communication between existing data systems.

The Virginia Code allows the court to order that a bond be forfeited to the Commonwealth if a defendant fails to appear as required.¹²⁵ In consulting with bail bondsmen, staff found that the practice of issuing process against bail bondsmen varies by court. In some localities, the court will issue a show cause against the bail bondsman as soon as the defendant fails to appear, while in other localities the court never issues a show cause to forfeit the bond. Additionally, staff discovered that DCJS is not frequently notified by the court when a bail bondsman fails to forfeit a bond as ordered.¹²⁶ Furthermore, the Virginia Code does not require DCJS to suspend a bail bondsman's license for failing to pay a forfeiture ordered by the court.¹²⁷ Therefore, a bail bondsman may continue posting bonds even if that bondsman has failed to comply with an order of the court to forfeit a bond.¹²⁸

Staff further found that data systems relating to bonds and bail bondsmen do not interface.¹²⁹ The number and amount of bond forfeitures statewide is unknown. Each licensed property bail bondsman is required to submit a monthly list of all outstanding bonds to DCJS;¹³⁰ however, there is no way to readily verify if this report is complete and accurate.¹³¹ Staff proposed that these concerns be considered as part of the plan for statewide data integration and case tracking across the criminal justice system and any other related systems.¹³²

Recommendations

In addition to the Virginia Pre-Trial Data Project, Crime Commission members were also presented with study findings relating to the pre-trial process and bail bondsmen at the November meeting and unanimously endorsed four recommendations at the December meeting.

Recommendation 1: Amend Virginia Code § 19.2-121 to require magistrates to complete the existing *Checklist For Bail Determinations* (Form DC-327) and transmit it to the court.¹³³

Staff found that judges, magistrates, Commonwealth’s Attorneys, and criminal defense attorneys all agreed that information on the defendant’s background and the facts and circumstances of the offense were incredibly useful when making bond determinations. This recommendation seeks to ensure that the information received by magistrates at the first bond hearing is available to other stakeholders for use during pre-trial proceedings relating to bond.

Bond determinations are made on a case-by-case basis by magistrates and judges using statutory requirements and discretion. A defendant may have multiple bond hearings before different judicial officers as his case progresses through the pre-trial process. Nearly all arrested defendants are initially taken before a magistrate, where the first bond hearing is conducted and a decision to detain or set the conditions of pre-trial release is made. Magistrates commonly record information on this form during that first bond hearing.

House Bill 2453 (Delegate Les R. Adams) was enacted during the Regular Session of the 2019 General Assembly to address this recommendation.¹³⁴ The legislation requires magistrates to complete this form and transmit it to the court whenever conducting a bond hearing for a person arrested on a warrant or *capias* for a jailable offense.

Recommendation 2: Amend Virginia Code § 19.2-149 to require the basis of an arrest to be stated by a surety when requesting a *capias*.

This recommendation seeks to ensure that the basis for a surety’s *capias* is recorded and to deter the use of such a *capias* by bail bondsmen as a means of enforcing a civil contract.¹³⁵ Currently the Virginia Code does not require that a surety provide a reason when they are requesting that a *capias* be issued by a judicial officer for the arrest of a defendant.¹³⁶ Because no such reason is required, the basis for issuance of the *capias* is not recorded. This frequently leads to confusion amongst the court, Commonwealth’s Attorney, defendant, and counsel for the defendant when he is returned to custody on this *capias*. Additionally, staff were advised that certain bail bondsmen will request a surety’s *capias* in instances where the defendant failed to comply with the terms of a payment plan for the bond.¹³⁷

House Bill 2453 (Delegate Les R. Adams) was enacted during the Regular Session of the 2019 General Assembly to address this recommendation.¹³⁸ Additionally, staff

were advised by OES that as a result of the enactment of this statute, the *Surety's Capias and Bailpiece Release* (Forms DC-331 and CC-1305) will be amended to include a required section for the basis of arrest.

Recommendation 3: Amend Virginia Code § 18.2-64.2 to increase the penalty for carnal knowledge of a defendant by a bail bond company owner or agent from a Class 1 misdemeanor to a Class 6 felony.

Increasing the penalty for carnal knowledge of a defendant by a bail bond company owner or agent serves two primary purposes. First, any bail bondsman convicted of such a felony offense could no longer be licensed by DCJS, unless he was pardoned or his civil rights were restored.¹³⁹ Currently there are no misdemeanor convictions, including carnal knowledge pursuant to this statute, that prohibit an individual from being licensed as a bail bondsman.¹⁴⁰ Second, this statute currently punishes carnal knowledge of a defendant by other individuals (correctional officers, probation/parole officers, court service unit employees, volunteers with such entities, etc.) as a Class 6 felony.¹⁴¹ Increasing the penalty for a violation of this statute by a bail bond company owner or agent provides consistent punishment amongst stakeholders in the criminal justice system.

Staff requested data from the Virginia Criminal Sentencing Commission in regard to misdemeanor violations of Virginia Code § 18.2-64.2. The data revealed that between FY16 to FY18 there were three misdemeanor convictions under this statute.¹⁴² All three convictions were entered in the circuit court against the same licensed bail bondsman.¹⁴³

Legislation was introduced by Sen. A. Benton Chafin (Senate Bill 1649) during the Regular Session of the 2019 General Assembly to address this recommendation. That bill was left in the Senate Committee on Finance.¹⁴⁴

Recommendation 4: Request Crime Commission staff to continue to examine the overall pre-trial process and to convene focus groups to address issues of uniformity within that process, including:

- First appearances;
- Bond hearings;
- Timely sharing of information, such as bail condition violations;
- Conditions of supervision and fees (GPS, drug testing, etc.); and,
- Monitoring of pre-trial jail populations.

Staff found that significant variances exist across the Commonwealth in relation to practices and procedures during the pre-trial process. These variances are commonly due to factors such as frequency of court dockets, availability of stakeholders, resources and technology, and local practices. Staff plans to utilize the findings of the Virginia Pre-Trial Data Project to identify particular areas of concern and inform further examination of the overall pre-trial process. Additionally, staff will need to consult with stakeholders across the Commonwealth in order to determine the most effective means of promoting uniformity within the pre-trial process while avoiding any potential unintended consequences of such reforms.

Acknowledgements

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Alexandria County Circuit Court Clerk's Office

Commonwealth's Attorneys' Services Council

Commonwealth of Virginia State Corporation Commission

Compensation Board

Fairfax County Circuit Court Clerk's Office

Indigent Defense Commission

Office of the Executive Secretary of the Supreme Court of Virginia

Virginia Association of Commonwealth's Attorneys

Virginia Community Criminal Justice Association

Virginia Criminal Justice Conference

Virginia Criminal Sentencing Commission

Virginia Department of Corrections

Virginia Department of Criminal Justice Services

Virginia Sheriffs' Association

Virginia State Police

The Crime Commission also wishes to thank all judges, magistrates, Commonwealth's Attorneys, Public Defenders, court-appointed counsel, Sheriffs, local and regional jail administrators, city and county administrators, pretrial services agency directors, managers, and officers, and bail bondsmen who provided survey responses.

Appendix 1: Overview of Virginia Pre-Trial Data Project

Primary Purpose: Evaluate the effectiveness of various pre-trial release mechanisms at ensuring public safety and appearance at court proceedings.

Pre-trial release mechanisms at initial contact and at time of release:

- Summons
- Personal recognizance
- Unsecured bond
- Secured bond (cash, property, surety)
- Held without bond

The Project contains 2 phases:

1. Development of the October 2017 Cohort [Complete]

- A cohort of nearly 23,000 defendants charged via summons, warrant, or direct indictment in October 2017 tracked through December 31, 2018.

2. Tracking Outcomes for the October 2017 Cohort [Nearly Complete]

- **Final Disposition of Charge(s):** disposition status of October 2017 contact event charge(s)
 - Guilty, *nolle prosequi*, dismissed, deferred, not guilty, NGRI, etc.
- **Public Safety:** new in-state arrest for jailable offense prior to final disposition of case.
- **Failure to appear:** any instance where the defendant was charged with FTA pursuant to Virginia Code §§ 19.2-128, 18.2-456, 16.1-69.24, 29.1-210, 46.2-936, 46.2-938, and 19.2-152.4:1 prior to the final disposition of case.

Data Sources to Identify and Track Cohort:

- OES E-magistrate System (E-mag)
- OES Court Case Management Systems (CMS)
- Fairfax and Alexandria Circuit Court data
- Virginia State Police Criminal History Records
- Compensation Board Local Inmate Data System- Correctional Information System (LIDS-CORIS)
- DCJS Pretrial and Community Corrections Case Management System (PTCC)- Pretrial Services Agency and Community Corrections Data
- Department of Corrections State Probation Data

Domains of Additional Variables Captured:

- Contact Event Charge(s)
- Defendant Demographics
- Attorney Type
- Conditions of Pre-Trial Release
 - Pretrial services agency supervision
 - Other conditions (GPS, HEM, etc.)
- Length of Stay and Detention Status (time detained prior to trial/final disposition)
- Prior Criminal History Record
 - Overall prior criminal arrests and convictions
 - Prior felony arrests and convictions
 - Prior violent arrests and convictions
 - Prior misdemeanor arrests and convictions
 - Prior FTA charges and convictions
- Pending Criminal Charges at Time of Contact Event
- Active Probation at Time of Contact Event (state or local)
- Prior Substance Use History
- Prior Active Term(s) of Incarceration
- Risk Assessment Instrument Scores
 - Modified VPRAI
 - Public Safety Assessment (PSA)
- Locality-Specific Variables (population, population density, demographics, poverty level, household income, etc.)

Endnotes

- ¹ Virginia State Crime Commission. (2017). *Annual Report: Pretrial Services Agencies*, pp. 111-144. Retrieved from <https://rga.lis.virginia.gov/Published/2018/RD207/PDF>.
- ² It was determined with the highest degree of confidence that the October 2017 cohort was not unique in terms of the number and types of defendants charged. The breakdown of the cohort was exceptionally similar to a pilot cohort representing July 2015, as well as a 6-month time frame cohort representing November 2017 thru April 2018. As such, it is assumed that findings from the October 2017 cohort are generalizable to any other given month.
- ³ 2019 Va. Acts ch. 708.
- ⁴ Virginia State Crime Commission. *2017 Annual Report*, pp. 111-144. Retrieved from <https://rga.lis.virginia.gov/Published/2018/RD207/PDF>.
- ⁵ Virginia State Crime Commission. (2018, March 27). *Pretrial Services Directors' Meeting - Preliminary Needs Assessment Findings*. Retrieved from <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/training-events/4498/vsccpretrialworkgrouppresentationmarch272018final1.pdf>.
- ⁶ See Virginia Department of Criminal Justice Services. *Virginia State Crime Commission Study on Pretrial Services in Virginia: DCJS Action Plan*. Retrieved from <https://www.dcjs.virginia.gov/news/virginia-state-crime-commission-study-pretrial-services-virginia-dcjs-action-plan>.
- ⁷ Virginia Department of Criminal Justice Services. (2018, November 8). *Enhancing Pretrial Services Agencies in Virginia*. Retrieved from <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/announcements/vscc10292018fc.pdf>.
- ⁸ The findings of the Virginia Pre-Trial Data Project can be used to inform policy-making in relation to both pretrial services agencies and the overall pre-trial process in Virginia.
- ⁹ Virginia Department of Criminal Justices Services, email communication, November 2, 2018.
- ¹⁰ 2019 Va. Acts ch. 176. Both Recommendations 1 and 2 were addressed by this legislation.
- ¹¹ Senate Bill 1649. Legislation left in the Senate Committee on Finance is not enacted into law by the General Assembly. See Va. Code § 30-19.1:4 (2018). Fiscal impact statements are prepared by the Virginia Criminal Sentencing Commission for any bill that will result in a net increase in periods of imprisonment in state adult correctional facilities.
- ¹² Office of the Executive Secretary of the Supreme Court of Virginia. *Court Case Forms—Criminal, DC-300 Series, District Court Manual Forms Volume*. Retrieved from <http://www.courts.state.va.us/courtadmin/aoc/legalresearch/resources/manuals/dcforms/dc300scriminal.pdf>.
- ¹³ See Appendix 1 for an overview of the Virginia Pre-Trial Data Project.
- ¹⁴ It was determined with the highest degree of confidence that the October 2017 cohort was not unique in terms of the number and types of defendants charged. The breakdown of the cohort was exceptionally similar to a pilot cohort

representing July 2015, as well as a 6-month time frame cohort representing November 2017 thru April 2018. As such, it is assumed that findings from the October 2017 cohort are generalizable to any other given month.

- ¹⁵ Virginia State Crime Commission. (2018, November 8). *Virginia Pre-Trial Data Project: Comparison of Pre-Trial Release Mechanism Outcomes*. Retrieved from <http://vscc.virginia.gov/VSCC%20FINAL%20Pretrial%20Data%20Project%20Presentation.pdf>.
- ¹⁶ See Va. Code §§ 16.1-69.24, 18.2-456, 19.2-128, 29.1-210, 46.2-936, 46.2-938, and 19.2-152.4:1 (2018).
- ¹⁷ Va. Code § 18.2-456(5) (2018).
- ¹⁸ 2019 Va. Acts ch. 708.
- ¹⁹ Va. Code § 18.2-456 (2018).
- ²⁰ Va. Code § 19.2-128 (2018).
- ²¹ See *Abdo v. Commonwealth*, 64 Va. App. 468, 477, 769 S.E.2d 677, 681 (2015), citing *Carter v. Commonwealth*, 2 Va. App. 392, 397, 345 S.E. 2d 5, 8 (1986). (“...[A] contempt conviction must be supported by evidence that ‘the contempt was committed willfully.’”)
- ²² Va. Code § 19.2-128 (2018).
- ²³ 2019 Va. Acts ch. 708.
- ²⁴ See *Hunter v. Commonwealth*, 15 Va. App. 717, 721, 427 S.E.2d 197, 200 (1993), quoting *Trice v. United States*, 525 A.2d 176, 179 (D.C. 1987). (“Any failure to appear after notice of the appearance date [is] *prima facie* evidence that such failure to appear [was] willful.”).
- ²⁵ Va. Code § 18.2-456 (2018).
- ²⁶ See *Scialdone v. Commonwealth*, 279 Va. 422, 444, 689 S.E.2d 716, 728 (2010), citing *Cooke v. United States*, 267 U.S. 517 (1925). (“...[U]nless the contempt is ‘committed in open court’, due process ‘requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.’ This opportunity includes ‘the assistance of counsel, if requested, and the right to call witnesses.’”).
- ²⁷ 56% (1,289 of 2,307) of the total charges in general district courts under Va. Code § 18.2-456 in the October 2017 dataset (data is unrelated to the Virginia Pretrial Data Project) were clearly for failure to appear based on the charge description; whereas, the remainder were not clear.
- ²⁸ See 2018 Va. Acts ch. 679. Legislation was enacted during the Regular Session of the 2018 General Assembly to facilitate the sharing of data among agencies of the Commonwealth and between the Commonwealth and political subdivisions. This led to the appointment of a Chief Data Officer for Virginia by the Governor within the Secretariat of Administration. Office of the Governor. (2018, July 27). Governor Northam Announces Administration Appointments. Retrieved from <https://www.governor.virginia.gov/newsroom/all-releases/2018/july/headline-827973-en.html>.
- ²⁹ See, e.g., ACLU. (2017, December 11). Initiative to Push Back Against For-Profit Bail Companies That Amass Wealth on Backs of Poor People and Fight Reform to Protect Their Profits. Retrieved from <https://www.aclu.org/news/aclu-announces-nationwide-campaign-support-movement-end-money-bail>. See also Stanford Social Innovation Review. (Spring 2019). The Fight to End Cash Bail. Retrieved from https://ssir.org/articles/entry/the_fight_to_end_cash_bail.

- ³⁰ See, e.g., Harvard Law School. (Oct. 2016). *Moving Beyond Money: A Primer on Bail Reform*, pp. 14-29. Retrieved from <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.
- ³¹ Virginia Department of Criminal Justice Services, FY18 PTCC Merged Monthly Report.
- ³² Va. Code § 19.2-159 (2018). A defendant is entitled to appointment of counsel if his available funds are equal to or below 125% of the federal poverty guidelines as set by the federal Department of Health and Human Services. See Office of the Executive Secretary of the Supreme Court of Virginia. (2019, January 11). *Eligibility for Court-Appointed Counsel Indigency Guidelines*. Retrieved from http://www.courts.state.va.us/courtadmin/aoc/djs/resources/indigency_guidelines.pdf.
- ³³ See Office of the Executive Secretary of the Supreme Court of Virginia. (Oct. 2011). *Financial Statement – Eligibility Determination for Indigent Defense Services* (Form DC-333). Retrieved from <http://www.courts.state.va.us/forms/district/dc333.pdf>.
- ³⁴ See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), holding “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”
- ³⁵ The findings of this Project can be used to inform policy-making in relation to both pretrial services agencies and the overall pre-trial process in Virginia.
- ³⁶ Virginia State Crime Commission. *2017 Annual Report*, pp. 111-144. Retrieved from <https://rga.lis.virginia.gov/Published/2018/RD207/PDF>.
- ³⁷ Virginia State Crime Commission. (2018, March 27). *Pretrial Services Directors’ Meeting - Preliminary Needs Assessment Findings*. Retrieved from <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/training-events/4498/vsccpretrialworkgrouppresentationmarch272018final1.pdf>. Formal needs assessment surveys were provided to and completed by numerous stakeholders, including circuit court judges (94 of 159; 59%), general district court judges (76 of 117; 65%), juvenile and domestic relations district court judges (65 of 117; 56%), magistrates (226 of 413; 55%), Commonwealth’s Attorneys (94 of 120; 78%), public defenders (24 of 25; 96%), court-appointed counsel (372 of ~1,608; 23%), local and regional jail administrators (56 of 67; 84%), city and county administrators (30 of 138; 22%), pretrial services agency directors (33 of 33; 100%), and pretrial services agency managers and officers (147 of ~207; 71%).
- ³⁸ See Virginia Department of Criminal Justice Services. (2018). *Virginia State Crime Commission Study on Pretrial Services in Virginia: DCJS Action Plan*. Retrieved from <https://www.dcjs.virginia.gov/news/virginia-state-crime-commission-study-pretrial-services-virginia-dcjs-action-plan>.
- ³⁹ Va. Code §§ 19.2-152.4:3(A)(1) and 19.2-152.4:3(A)(2) (2018).
- ⁴⁰ See Va. Code § 19.2-123(A)(1) (2018). Judicial officers may impose pretrial services agency supervision as a condition of bond.
- ⁴¹ Virginia Department of Criminal Justice Services, FY18 PTCC Merged Monthly Report.
- ⁴² Virginia Department of Criminal Justice Services (2018, April 2). *Virginia Pretrial Risk Assessment Instrument (VPRAI) Instruction Manual Version 4.3*, pp. 15.

Retrieved from

https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai_0.pdf. The Virginia Pretrial Risk Assessment Instrument-Revised (VPRAI-R) and a newly created supervision tool (Praxis) were implemented statewide.

⁴³ Va. Code § 19.2-152.4:3(A)(2) (2018).

⁴⁴ Va. Code § 19.2-121 (2018).

⁴⁵ *Id.*

⁴⁶ Virginia Department of Criminal Justice Services (2018, April 2). *Virginia Pretrial Risk Assessment Instrument (VPRAI) Instruction Manual Version 4.3*, pp. 9-16.

Retrieved from

https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai_0.pdf.

⁴⁷ These findings were supported by personal communications, formal needs assessment survey responses, follow-up survey responses from district court judges, and discussions during the Virginia Pretrial Services Stakeholder Group.

⁴⁸ DeMichelle, M., Comfort, M., Misra, S., Barrick, K., & Baumgartner, P. (2018). The Intuitive-Override Model: Nudging judges toward pretrial risk assessment instruments. Retrieved from SSRN <http://dx.doi.org/10.2139/ssrn.3168500>

⁴⁹ DeMichelle, M., Baumgartner, P., Barrick, K., Comfort, M., Scaggs, S., & Misra, S. (2018). What do criminal justice professionals think about risk assessment at pretrial? Retrieved from SSRN <http://dx.doi.org/10.2139/ssrn.3168490>

⁵⁰ *Id.*

⁵¹ *Id.* at 15.

⁵² Virginia Department of Criminal Justice Services (2018, April 2). *Virginia Pretrial Risk Assessment Instrument (VPRAI) Instruction Manual Version 4.3*, pp. 13, 18.

Retrieved from

https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai_0.pdf.

⁵³ Danner, M.J.E., VanNostrand, M., & Spruance, L.M. (2016). Race and gender neutral pretrial risk assessment, release recommendations, and supervision: VPRAI and Praxis Revised, pp. 30. Retrieved from

<https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/race-and-gender-neutral-pretrial-risk-assessment-release-recommendations-and-supervision.pdf>.

⁵⁴ *Id.* at pp. 15, 17.

⁵⁵ Va. Code § 19.2-152.2 (2018).

⁵⁶ Va. Code § 19.2-152.4:3(A)(2) (2018).

⁵⁷ Va. Code § 19.2-119 (2018).

⁵⁸ While this pretrial services agency communicates and shares information with their magistrate's office, the agency does not complete a pretrial investigation report for use when the magistrate is making an initial bond determination.

⁵⁹ Va. Code §§ 19.2-80, 19.2-82(A), and 19.2-234 (2018). If a person was arrested without a warrant, the judicial officer must first determine whether there is probable cause that a criminal offense has been committed prior to issuing a warrant or summons.

⁶⁰ Virginia State Crime Commission. (2018, November 8). *Virginia Pre-Trial Data Project - Comparison of Pre-Trial Release Mechanism Outcomes*, slide 8. Retrieved

from

<http://vscc.virginia.gov/VSCC%20FINAL%20Pretrial%20Data%20Project%20Presentation.pdf>.

- ⁶¹ See National Association of Pretrial Services Agencies. (2004). *Standards on pretrial release*, third edition, Standard 2.2, pp. 26-32. Retrieved from <https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards>.
- ⁶² American Council of Chief Defenders, Gideon's Promise, National Association for Public Defense, National Association of Criminal Defense Lawyers, and National Legal Aid and Defenders Association. (March 2019). *Joint Statement: Pretrial Risk Assessment Instruments*. Retrieved from <https://www.nacdl.org/criminaldefense.aspx?id=54074>. The original statement issued in May 2017 was retrieved from https://www.publicdefenders.us/blog_home.asp?display=563.
- ⁶³ Personal communications with magistrates and responses to the magistrate formal needs assessment survey.
- ⁶⁴ Virginia Department of Criminal Justice Services. (2018, November 8). *Enhancing Pretrial Services Agencies in Virginia*. Retrieved from https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/announcements/vscc_10292018fc.pdf.
- ⁶⁵ *Id.* at slides 10-15.
- ⁶⁶ Va. Code §§ 19.2-80, 19.2-82(A), and 19.2-234 (2018). If a person was arrested without a warrant, the judicial officer must first determine whether there is probable cause that a criminal offense has been committed prior to issuing a warrant or summons.
- ⁶⁷ Virginia State Crime Commission. (2018, November 8). *Virginia Pre-Trial Data Project - Comparison of Pre-Trial Release Mechanism Outcomes*, slide 8. Retrieved from <http://vscc.virginia.gov/VSCC%20FINAL%20Pretrial%20Data%20Project%20Presentation.pdf>.
- ⁶⁸ Va. Code § 19.2-121 (2018).
- ⁶⁹ See Office of the Executive Secretary of the Supreme Court of Virginia. *Court Case Forms—Criminal, DC-300 Series, District Court Manual Forms Volume*. Retrieved from <http://www.courts.state.va.us/courtadmin/aoc/legalresearch/resources/manuals/dcforms/dc300scriminal.pdf>.
- ⁷⁰ Va. Code § 19.2-123 (2018).
- ⁷¹ Va. Code § 19.2-120(D) (2018).
- ⁷² Va. Code § 19.2-130.1 (2018).
- ⁷³ Va. Code § 19.2-123(A) (2018).
- ⁷⁴ Va. Code § 19.2-158 (2018).
- ⁷⁵ See Office of the Executive Secretary of the Supreme Court of Virginia. Virginia's Judicial System. Retrieved from <http://www.courts.state.va.us/courts/home.html>. Court schedules are available through this system for individual circuit courts (<http://www.courts.state.va.us/courts/circuit.html>), general district courts (<http://www.courts.state.va.us/courts/gd.html>), and juvenile and domestic relations district courts (<http://www.courts.state.va.us/courts/jdr.html>).
- ⁷⁶ Va. Code § 19.2-158 (2018).

- ⁷⁷ Va. Code § 19.2-3.1 (2018).
- ⁷⁸ Va. Code § 19.2-158 (2018).
- ⁷⁹ *Id.*
- ⁸⁰ Va. Code § 19.2-124 (2018).
- ⁸¹ Va. Code § 19.2-132 (2018).
- ⁸² Va. Code § 19.2-158 (2018).
- ⁸³ Further information on the Virginia Criminal Justice Conference was retrieved from <https://www.vtla.com/index.cfm?pg=VCJC>.
- ⁸⁴ Va. Code § 19.2-124 (2018).
- ⁸⁵ Va. Code § 19.2-123(A) (2018).
- ⁸⁶ Va. Code § 19.2-120(D) (2018).
- ⁸⁷ Va. Code § 19.2-130.1 (2018).
- ⁸⁸ Va. Code § 19.2-123(A)(4) (2018).
- ⁸⁹ *Id.*
- ⁹⁰ Virginia State Crime Commission. *2017 Annual Report*, pp. 123. Retrieved from <https://rga.lis.virginia.gov/Published/2018/RD207/PDF>.
- ⁹¹ 2010 Va. Acts ch. 874. Item 370 of the 2010 Appropriations Act. Retrieved from <https://budget.lis.virginia.gov/item/2010/1/hb30/chapter/1/370/>.
- ⁹² *Id.*
- ⁹³ Virginia Department of Criminal Justice Services. (n.d.). *Guidelines for Local Electronic/GPS Monitoring Programs*. Retrieved from <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/guidelines-local-electronic-gps-monitoring-programs.pdf>.
- ⁹⁴ 24 Va. Admin. Code § 35-60-20 (2018). *See also* Va. Code §§ 18.2-270.1 and 18.2-270.2 (2018).
- ⁹⁵ *Id.*
- ⁹⁶ Commission on Virginia Alcohol Safety Action Program. *About the Commission*. Retrieved from <http://www.vasap.state.va.us/aboutthecommission/aboutthecommission.html>.
- ⁹⁷ Virginia Department of Criminal Justice Services, FY18 PTCC Merged Monthly Report.
- ⁹⁸ This information will be collected as part of the Virginia Pre-Trial Data Project.
- ⁹⁹ Va. Code § 9.1-185 (2018).
- ¹⁰⁰ Va. Code §§ 9.1-185, 9.1-185.5, 38.2-1800, and 38.2-1814 (2018).
- ¹⁰¹ Va. Code §§ 9.1-185.8 and 38.2-1809 (2018).
- ¹⁰² Va. Code §§ 9.1-185.16, 38.2-2412.1, and 38.2-2412.2 (2018).
- ¹⁰³ Va. Code § 9.1-185 (2018).
- ¹⁰⁴ Va. Code § 9.1-185.5(C) (2018).
- ¹⁰⁵ Va. Code § 9.1-185.8(E) (2018).
- ¹⁰⁶ Va. Code § 9.1-185.8 (2018).
- ¹⁰⁷ Va. Code § 9.1-185 (2018).
- ¹⁰⁸ Va. Code § 9.1-185.8 (2018).
- ¹⁰⁹ Virginia Department of Criminal Justices Services, email communication, November 2, 2018.
- ¹¹⁰ *Id.*
- ¹¹¹ *See* Commonwealth of Virginia State Corporation Commission. *Overview of the Commission*. Retrieved from <https://www.scc.virginia.gov/comm/overview.aspx>.

- ¹¹² Virginia Department of Criminal Justice Services, personal communication, May 22, 2018. Commonwealth of Virginia State Corporation Commission, email communication, November 2, 2018.
- ¹¹³ Va. Code § 9.1-185 (2018).
- ¹¹⁴ *But see* Va. Code § 19.2-152.4:3(A)(3) (2018). The Code requires pretrial services agency officers to supervise defendants in order to ensure compliance with the terms and conditions of bail.
- ¹¹⁵ This finding was supported by personal communications, field observations, and survey responses from licensed bail bondsmen.
- ¹¹⁶ Va. Code § 9.1-185.4(B)(1) (2018). Per Virginia Department of Criminal Justice Services, email communication, November 6, 2018, DCJS has identified at least 5 such licensed bail bondsmen who have a felony conviction.
- ¹¹⁷ Virginia Department of Criminal Justice Services, personal communication, May 22, 2018.
- ¹¹⁸ *Id.*
- ¹¹⁹ Va. Code § 9.1-139(K) (2018).
- ¹²⁰ Va. Code § 9.1-186.4(B)(2)-(3) (2018).
- ¹²¹ Va. Code § 19.2-13(C) (2018).
- ¹²² Va. Code § 46.2-116(C) (2018).
- ¹²³ Va. Code § 19.2-149 (2018).
- ¹²⁴ *Id.*
- ¹²⁵ Va. Code § 19.2-143 (2018).
- ¹²⁶ Virginia Department of Criminal Justice Services, personal communication, May 22, 2018.
- ¹²⁷ *See* Va. Code § 9.1-185.8 (2018).
- ¹²⁸ *See* 2019 Va. Acts. ch. 200. This legislation was introduced (Del. Richard P. Bell) on behalf of the Virginia Bail Association and enacted during the Regular Session of the 2019 General Assembly to address this issue.
- ¹²⁹ These data systems are operated by the Virginia Department of Criminal Justice Services, the Office of the Executive Secretary of the Supreme Court of Virginia, and the State Corporation Commission. Per Virginia Department of Criminal Justice Services, email communication, November 2, 2018, DCJS was in the process of developing an online application and report submission system for use by bail bondsmen; however, DCJS was unaware whether this system would be able to interface with other data systems.
- ¹³⁰ Va. Code § 9.1-185.14 (D) (2018).
- ¹³¹ Office of the Executive Secretary of the Supreme Court of Virginia, Magistrate Services, personal communication, November 7, 2018. The E-magistrate system can be used to generate a list of bonds posted by individual bail bondsmen; however, bail bondsmen can work for multiple companies and the list cannot identify which company that bail bondsmen was working for when the bond was posted.
- ¹³² Recommendation 2 as part of the Virginia Pre-Trial Data Project.
- ¹³³ Office of the Executive Secretary of the Supreme Court of Virginia. *Court Case Forms—Criminal, DC-300 Series, District Court Manual Forms Volume*. Retrieved from <http://www.courts.state.va.us/courtadmin/aoc/legalresearch/resources/manuals/dcforms/dc300scriminal.pdf>.

¹³⁴ 2019 Va. Acts ch. 176.

¹³⁵ *See* 2019 Va. Acts ch. 205. This legislation was introduced (Del. Christopher E. Collins) on behalf of the Virginia Bail Association and enacted during the Regular Session of the 2019 General Assembly to address this issue.

¹³⁶ Va. Code § 19.2-149 (2018).

¹³⁷ Personal communications with and survey responses from licensed bail bondsmen.

¹³⁸ 2019 Va. Acts ch. 176.

¹³⁹ Va. Code § 9.1-185.4(B)(1) (2018)

¹⁴⁰ *See* Va. Code § 9.1-185.4(B) (2018)

¹⁴¹ Va. Code § 18.2-64.2 (2018).

¹⁴² Source: Supreme Court of Virginia- Court Case Management Systems. Data provided by Virginia Criminal Sentencing Commission.

¹⁴³ One conviction was entered in Henrico County Circuit Court and the other two convictions were entered in the Prince George County Circuit Court. *See* Rockett, A. (2017, May 10). Richmond-area bondsman who traded bail for sexual favors sentenced to 2 ½ years. *Richmond Times-Dispatch*. Retrieved from https://www.richmond.com/news/local/crime/richmond-area-bondsman-who-traded-bail-for-sexual-favors-sentenced/article_cd9bcf96-7aad-50f7-88a2-112c280fe6ea.html.

¹⁴⁴ Legislation left in the Senate Committee on Finance is not enacted into law by the General Assembly.